U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In The Matter of:

C. D. VARNADORE,

COMPLAINANT,

v.

OAK RIDGE NATIONAL LABORATORY, LOCKHEED MARTIN ENERGY SYSTEMS, INC., AND LOCKHEED MARIETTA CORPORATION,

RESPONDENTS.

CASE NOS. 94-CAA-2

94-CAA-3

DATE: SEP 6, 1996

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

ORDER

On June 23, 1995, the Administrative Law Judge (ALJ) issued a Recommended Order Awarding Attorney's Fee and Cost [sic] (R. O.) in this case, which at the time was awaiting decision on review by the Secretary.[1] Complainant, C.D. Varnadore through his attorneys, then filed a Motion for Preliminary Order pursuant to 42 U.S.C. § 5851(b)(2)(A) (1988 and Supp. V 1993).[2] Following briefing on the issue whether attorney's fees awards are subject to § 5851(b)(2)(A), on September 11, 1995, the Secretary issued a Preliminary Order (P.O.) that the ALJ's recommended attorney's fees award of $27,174.83 be paid.[3] On September 28, 1995,

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[1] This case is commonly known as *Varnadore II. See Varnadore v. Oak Ridge National Laboratories and Lockheed Martin Corporation,* Case Nos. 92-CAA-2, 92-CAA-5, 93-CAA-1, 94-CAA-2, 94-CAA-3, 95-ERA- 1, Final Consolidated Decision and Ord.. June 14, 1996. at 3.

[2] Subsection 5851(b)(2)(A) provides in pertinent part:

> Upon the conclusion of [a public hearing before an ALJ] and the issuance of a recommended decision that the complaint has merit. the Secretary shall issue a preliminary order providing the relief prescribed in subparagraph (B), but may not order compensatory damages pending a final order.

Subparagraph 5851(b)(2)(B) describes the various kinds of relief that are available should the Secretary determine that there has been a violation of the ERA whistleblower provision.

[3] The only other relief recommended by the ALJ was that Varnadore's 1992 performance evaluation be expunged from his personnel record and that LMES not take action

(continued...)

Respondent Lockheed Martin Energy Systems' (LMES) attorney forwarded to Varnadore's attorney (payable to the attorney) a check in the full amount ordered by the Secretary. Respondent's Motion for an Order Requiring Repayment of Attorney Fees, dated June 27, 1996 (Motion for Repayment), Exhibit B.

On June 14, 1996, the Department of Labor's Administrative Review Board[4] issued a Final Consolidated Decision and Order (F. C. D. and O.) in the *Varnadore* cases, dismissing them. In light of that decision, on June 28, 1996, LMES filed a Motion for an Order Requiring Repayment of Attorney Fees in this case. Varnadore was given an opportunity to respond to that motion. For the reasons discussed below, we grant LMES' motion, rescind the Preliminary Order, and order Varnadore's counsel to repay the preliminary attorney's fee award.

DISCUSSION

In 1992 the whistleblower provision of the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. § 5851 (1988), was amended in several respects by Section 2902 of the Comprehensive National Energy Policy Act of 1992 (CNEPA), Pub. L. No. 102-486, 106 Stat. 3123, 3124 (Oct. 24, 1992). Amended subsection 5851(b)(2)(A) now requires the Secretary to issue a preliminary order if the ALJ has issued a recommended decision that the complaint has merit. The preliminary order is to provide the relief contained in the ALJ's recommended decision except for an award of compensatory damages.[5] We have previously held that the preliminary order

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[3](...continued)
against Varnadore without good cause shown. *Varnadore* II, R. O. at 11. The Secretary's P. O. also included these provisions. P.O. at 11.

[4] On April 17, 1996, a Secretary's Order was signed delegating jurisdiction to issue final agency decisions under the statutes at issue here to the newly created Administrative Review Board. 61 Fed. Reg. 19978 (May 3, 1996).

Secretary's Order 2-96 contains a comprehensive list of the statutes, executive order, and regulations under which the Administrative Review Board now issues final agency decisions. The final procedural revisions to the regulations implementing this reorganization are found at 61 Fed. Reg. 19982.

[5] Subparagraph 5851(b)(2)(B), which was not amended by the CNEPA, delineates the relief available in ERA whistleblower cases:

> (B) If, in response to a complaint filed under paragraph (1), the Secretary determines that a violation of subsection (a) of this section has occurred, the Secretary shall order the person who committed such violation to (I) take affirmative action to abate the violation, and (ii) reinstate the complainant to his former position together with the compensation (including back pay), terms, conditions, and privileges of his employment, and the Secretary may order such person to provide compensatory damages to the complainant. If an order is issued under this paragraph, the Secretary, at the request of the complainant shall assess against the person (continued...)

provision encompasses ALJ recommended attorney's fee awards. *See e.g., Varnadore II,* P.O., September 11, 1995. We now conclude that the plain meaning as well as the purposes of the whistleblower provision of the ERA requires that the P. O. be rescinded based upon our Final Consolidated Decision and Order, which dismissed all of Varnadore's claims against LMES.

Subsection 5851(b)(2)(A) of the ERA does not explicitly require that a preliminary award of attorney's fees be rescinded if the complainant does not prevail on the merits of his or her case. However, that is a reasonable conclusion based upon the language of the ERA's whistleblower provision. To frame the issue most clearly it is necessary first to discuss the meaning of the ERA's attorney's fee award provision.

Pursuant to § 5951(b)(2)(B), if the Secretary (now the Board) determines that "a violation" of the ERA whistleblower provision "has occurred," the Secretary shall issue an order prescribing relief. If such an order is issued the Secretary "shall assess" reasonable costs and expenses, including attorney's and expert witness fees, incurred by the complainant in bringing the complaint, 'against the person against whom the order is issued." This provision is unusual in that it does not contain the typical standard for the award of attorney's fees, such as "prevailing," or "substantially prevailing," or "successful." *See, e.g. Ruchelshaus v. Sierra Club,* 463 U.S. 680, 683 (1983). However, for purposes of deciding this case we needn't explore whether the ERA's attorney's fees provision is broader than those provisions which use these more common terms. At a minimum the ERA provision requires that the Secretary (now the Board) must have determined that a violation of the ERA whistleblower provision occurred in order to award attorney's fees to the complainant. As the Supreme Court has noted, "the consistent rule is that complete failure will not justify shifting fees from the losing party to the winning party." *Ruchelshaus v. Sierra Club,* 463 U.S. at 683. "Put simply, ordinary conceptions of just returns reject the idea that a party who wrongly charges someone with violations of the law should be able to force that defendant to pay the costs of the wholly unsuccessful suit against it." *Ruchelshaus v. Sierra Club,* 463 U.S. at 683. Thus, we think it is clear that Varnadore would have no grounds upon which to seek attorneys fees now that he has lost on all claims pending before the Department of Labor.

It is also the case that where a party has been awarded attorney's fees below, but the judgment upon which the fee award was based is reversed, the award falls with the judgment. *See Palmer v. City of Chicago,* 806 F.2d 1316, 1319 (7th Cir. 1989). Courts have applied the same principle to interim orders. Thus, for example, in *NAACP v. Detroit Police Officers Assoc.,* 46 F.3d 528, 529 (6th Cir. 1995), the court held that "[w]hen a plaintiff has no valid theory of recovery and is entirely unsuccessful in its suit on the merits, it may not thereafter recover attorneys' fees based on interim orders that provided plaintiff some benefit." Thus, the fact that Varnadore prevailed on some issues before the ALJ and received some preliminary relief, such as

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[5](...continued)
against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys' and expert witness fees) reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued.

the expungement of his 1992 performance appraisal, would not justify the award of fees at this point in the case.

Therefore, it is abundantly clear that Varnadore would not now be entitled to an award of attorney's fees. The question presented here, however -- whether, having been preliminarily awarded attorney's fees, Varriadore (or Varnadore's counsel) must be ordered to return them consistent with our final decision on the merits of *Varnadore II* -- is more problematic. Assuming, as we must, that Varnadore would not now be entitled to an award of attorney's fees, the question becomes do we have the authority to order the recision of the P. O. granting such fees and the repayment of them to LMES? We conclude that we do have such authority.

First, the only stated purpose of the preliminary order provision is contained in remarks of Congressman Ford, on the floor of the House of Representatives, as he explained the preliminary order provision as reported by the conference committee:

> To remedy the long delays in obtaining relief for complainants with meritorious cases, the conference agreement amends section 210(b)(2)(A) of the Energy Reorganization Act to require the Secretary to order interim relief for any complainant who prevails at the hearing level. Once an Administrative Law Judge determines that the complaint has merit, the Secretary must, without delay, order the employer to abate the violation and reinstate the complainant to his or her former position together with the compensation, including [b]ack pay, terms, conditions, and privileges of his or her employment. No award of compensatory damages may issue, except as a final order of the Secretary.

138 Cong. Rec. H 11445 (daily ed. Oct. 5, 1992). Thus, the explicit purpose of the preliminary were not harmed by order provision was to assure that complainants *with meritorious claims* any delay between the issuance of the ALJ's recommended decision and the Secretary's final decision. That goal was achieved in this case when the Secretary issued his P.O. However, the Board has now determined that Varnadore's claims are not meritorious. Therefore, it would make no more sense to allow Varnadore (or his counsel) to retain the benefits of the preliminary order than that it would to issue a preliminary order in the first place if Varnadore had not prevailed at all before the ALJ. The logical and statutory underpinnings of the preliminary order have now been removed, as we have ruled that Varnadore was not retaliated against for engaging in activity protected by the ERA whistleblower provision. Therefore the "consistent rule" regarding attorney's fees applies: "complete failure will not justify shifting fees from the losing party to the winning party." *Ruchelshaus v. Sierra Club,* 463 U.S. at 683.

Citing *Macktal v. Brown and Root, Inc.,* Case No. 86-ERA-23, Sec. Ord., July 11, 1995,

Varnadore argues that the Secretary and the Board "have no statutory powers to order return of vision allowing such attorney fees from the preliminary order because there is no statutory pro an order." Letter Response to Motion re: Attorney Fees, July 31, 1996 at 1.[6] Varnadore's reliance is misplaced. In *Macktal* the parties had purported to settle an ERA whistleblower claim, and

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[6] Varnadore also claims that because the Department of Energy is reimbursing LMES for legal costs in this case, LMES is not the real party in interest. Varnadore cites no authority for this principle. We therefore reject this argument without further discussion.

Brown and Root had paid Complainant Macktal $35,000. However, the Secretary refused to enter into the settlement, because it included a term which the Secretary found was against public policy, and remanded the case for further proceedings. The ALJ then recommended dismissal because Macktal failed to comply which his order to repay the $35,000 before proceeding to a hearing. On review, the Secretary rejected the ALJ's recommended dismissal. The Secretary concluded that, in the absence of a broad statutory delegation of rulemaleing authority, "neither an ALJ nor the Secretary has the power to enter" an order that Macktal return the $35,000. *Macktal,* Sec. Ord. at 3.

Macktal is readily distinguishable from the present case. As *Macktal* held, the ERA does not grant the Secretary authority "to rectify inequitable bargains or order restitution of monies unfairly retained simply because the parties' dispute concerns, among other things, the whistleblower provision of the ERA." *Macktal,* Sec. Ord. at 6. Here, we are not dealing with the consequences of a private agreement between the parties to a complaint. We are dealing with the continuing validity of an order issued by the Secretary pursuant to explicit statutory authority. Common sense dictates that, as the Secretary has been given explicit statutory authority to issue preliminary orders under the ERA, the Secretary has also been given the authority to rescind such orders when they are no longer justified. With such power of recision comes the authority to order that the parties be returned to the *status quo* which existed prior to the issuance of the preliminary order.

This decision should come as no surprise to the parties. In the Preliminary Order issued on September 11, 1995, the Secretary explicitly addressed LMES' concern that it might not be able to recoup the attorney's fees award if it were determined that no violation of the ERA whistleblower provision had occurred. In response the Secretary emphasized that, "given the authority contained in 29 C.F.R. § 18.36 (1994) to exclude an attorney from appearing before an ALJ for refusal to comply with directions, it is unlikely that recoupment of attorney's fees will present a significant problem."

CONCLUSION

For the foregoing reasons the preliminary order, issued on September 11, 1995, is rescinded, and counsel for Complainant is ordered to repay the attorney's fees and costs paid to him pursuant to that order.

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM
Member

JOYCE D. MILLER
Alternate Member